Docket No: 03-0553
S.O.M: 11/30/04
Deadline: 12/01/04

M E M O R A N D U M

TO: The Commission

FROM: Terrance A. Hilliard, Administrative Law Judge

DATE: November 22, 2004

SUBJECT: TDS Metrocom, LLC
-vs-
Illinois Bell Telephone Company

Complaint concerning imposition of unreasonable and anti-competitive termination charges by Illinois Bell Telephone Company.

Illinois Bell Telephone Company

Motion for Commission to Reopen Record to Entertain Issuance of Amendatory Order

RECOMMENDATION: Grant Motion on limited basis.

On November 15, 2004, TDS Metrocom, LLC ("TDS") and Illinois Bell Telephone Company ("SBC") filed a joint motion requesting that, pursuant to Section 10-114 of the Act and Section 200.900 of the Commission's Rules, the Commission reopen the record and issue the amendatory order (attached to the Motion) vacating the award of attorneys'. fees and costs. Although not mentioned in the Motion, the proposed changes to the Order would also vacate the Commission's finding that SBC had engaged in anti-competitive behavior in regard to its contract termination policies.

In essence, the parties request that the Commission vacate the language in its October 28, 2004 Order finding SBC had engaged in anti-competitive conduct and the language awarding costs and fees to TDS. If the Commission complies with this request, SBC has agreed to pay TDS' fees and costs and TDS will retroactively amend its petition to withdraw the request for fees contained in its complaint. The parties contend that this proposal to amend the complaint is a change in fact that is sufficient under Rule 200.900 to allow the Commission to reopen the case and amend the relevant parts of its Order.

In the absence of an amendatory order, SBC advises that it plans to appeal the Commission's finding on this issue. If the case is not reopened, the last day for filing the notice of appeal is December 1, 2004. The filing and prosecution of this appeal, even if it is unsuccessful, will delay payment of TDS' fees for an extended period of time and involve additional expense for both sides. The parties contend that the requested action is consistent with the public policy favoring settlements of dispute by non-judicial means.

Staff's Response

Staff has filed a brief responsive to the Motion expressing several "concerns" it has about the parties' proposal.

First, Staff points out that the joint motion is inaccurate in characterizing the suggested change as only addressing attorneys fees and not substantive issues. The Commission's Findings and Ordering Paragraph 9 (which the Joint Movants propose be deleted in its entirety) provides the following:

> *We find that SBC's pre-March 4, 2004 termination charges for the products listed in Finding 8 above were anti-competitive and in violation of 5/13-514 of the Act.* TDS Metrocom is therefore entitled to an award of its external attorneys' fees and litigation costs in this proceeding, up to and including March 4, 2004, pursuant to the mandatory language of Section 5/13-516 of the Act. TDS Metrocom is directed to submit a statement of its fees and costs and supporting invoices to SBC within 45 days of the date of this Order. The Commission shall retain jurisdiction over this issue for the purpose of resolving disputes concerning said fees and costs;
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> *TDS Complaint Order*, at 40 (emphasis added).

The first sentence of this finding clearly addresses the substantive issue of whether SBC's pre-March 4, 2004, termination liability charges were unlawful and anti-competitive. This finding is the basis for the award of attorneys' fees but it is distinct from the issue of payment of attorneys' fees that the parties propose to settle. As is clear from the language in the first sentence quoted above, the Commission made an express substantive finding that SBC's pre-March 4, 2004 termination policies, were "anti-competitive and in violation of 5/13-514 of the Act." The remainder of the language in Findings and Ordering Paragraph 9, however, does address attorney's fees.

By requesting the deletion of Paragraph 9, the Joint Movants seek to vacate both the Commission's substantive finding of anti-competitive policies under section 13-514 and the remaining language addressing attorney's fees. Staff points out that the finding

of unlawful, anticompetitive behavior under Section 13-514 of the PUA cannot be credibly characterized as non-substantive.

Next, Staff points out that the Commission's rules governing reopening of the record in a proceeding require that one of the following be true: (1) the facts or the law have materially changed, or (2) if the public interest so requires. Section 200.900.[1] The Joint Movants contend that both requirements are met. Joint Movants argue that the proposed settlement of attorney's fees and the timing of such payment "is clearly a changed 'condition of fact' that warrants reopening the record."

In the Staff's view, a proposed post-Final Order settlement is not a change in fact within the meaning of Section 200.900. First, the rule envisions that the parties petitioning for a reopening establish a material change in fact or law that would justify the Commission taking another look at the issues decided by the order. An agreement to pay expeditiously those attorneys' fees awarded in the order rather than to pay them after appeals are exhausted is not a material change in the facts that were relied upon by the Commission in its order. Indeed, no change in the facts underlying the evidentiary record supporting the Commission's order have been presented by the Joint Movants which justify consideration of rescission of a Commission finding.[2]

Second, the proposed settlement is conditioned on the Commission taking the action the Joint Motion requests. Even assuming that a post order settlement can be considered a material change in fact, the proposed settlement is conditioned on the Commission's agreement to vacate its finding. As such, the "facts" have not "materially changed" but only have the potential "to change" if the Commission agrees to the proposed vacation.

Third, the Joint Movants support their assertion of "changed" facts by stating that TDS "framed the scope of the issues and the relief requested" and as such TDS "is entitled to modify that request." Staff argues that although TDS was entitled to modify its request for relief *before* the Commission issued its Final Order; whether TDS is entitled to modify its request for relief *after* the Commission issues its Final Order is another matter.

Staff points out the alleged public interest in post order settlements, (some measure of judicial economy) must be balanced against the losses to judicial economy that are also derived from supporting a post order settlement that requires the

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[1] Section 200.900 (Reopening on Motion of the Commission) provides the following:

> After issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening. No party may petition the Commission to reopen on its own motion until after the time to petition for rehearing has expired.

[2] See *Chicago Housing Authority v. Ill. Commerce Comm'n*, 20 Ill. 2d 37, 43-44, 169 N.E.2d 268, 273 ("Where the order rescinds a prior order, we believe that it is clear enough that the old findings were erroneous, that circumstances have changed in the intervening period, or that an error of law was made.").

Commission rescind a substantive finding in a final order. Requiring the Commission rewrite a final order to effect a settlement, may actually discourage pre-order negotiations, because it encourages parties to take a "wait and see" approach. In Staff's view, the public interest is generally served by favoring "resolution of disputes by negotiation and settlement rather than by litigation" *before* the Commission issues a Final Order.

The Staff also points out that the proposed post-Final Order of a Section 13-514 issue could affect parties beyond TDS and SBC. Section 13-514 of the Act prohibits actions by a telecommunications carrier from impeding the development of competition in any telecommunications service market. Section 13-516, moreover, provides for, in the Commission's discretion, increased fines for a carrier found to have violated Section 13-514 more than once. 220 ILCS 5/13-516(a)(2). A carrier found to have repeatedly violated Section 13-514, and consequently facing potentially stiff penalties for any future violations, would presumably be less inclined to engage in anticompetitive behavior, which, in turn would protect the competitive marketplace and those carriers that sought to compete in that market. The purpose of Section 13-514 is to protect the competitive market generally.

Thus, while this Section entitles the Commission to resolve disputes between two parties, it also delegates to the Commission the broader role of defining the parameters of anti-competitive behavior, which in turn affects other carriers and the market. Accordingly, any rescission of a conclusion of the Commission regarding what is and what is not anti-competitive behavior should not be done lightly. A finding of anti-competitive behavior may increase the penalties imposed in subsequent complaint cases and, particularly in this case, influence the rulemaking that the Commission also ordered that Staff undertake regarding industry wide termination charges.

Staff argues that the parties could have settled the issues raised in TDS' Complaint prior to the Commission reaching its determinations and issuing a Final Order. For whatever reasons, the parties weighed their respective risks and went forward with the litigation. The Commission, as it is required to do, resolved the issues raised in the Complaint and issued a Final Order. In an analogous situation, the Seventh Circuit reasoned as follows:

> Litigants who settle their dispute while an appeal is pending often file a joint motion asking us not only to dismiss the appeal but also to vacate the opinion and judgment of the district court. We always deny these motions to the extent they ask us to annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure.
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> *In Re Memorial Hosp. Of Iowa County, Inc.*, 862 F.2d 1299, 1300 (7th Cir. 1988) ("Memorial Hospital").

Staff suggests that In effect, the Joint Movants have requested that the Commission "rewrite" the history of this proceeding based upon a conditional post-Final Order settlement of a Section 13-514 issue.

TDS' Reply to Staff's Brief

TDS contends that Staff's response is "Kafkaesque." It states that if the Order is appealed, it will not participate in the defense of the Order because the cost of the appeal would exceed the amount of fees to be awarded by the Commission. TDS says that the settlement proposal at issue was solely its idea.

TDS says that Staff's concern about the substantive finding of anticompetitive behavior is "overdone." The only reason for the finding was to support the award of fees to TDS because SBC had already revised its policies prior to the conclusion of the case. Other than the TDS request for fees there was no reason to enter the finding. Therefore if the request for fees is withdrawn there is no need to preserve the finding. According to TDS, it becomes moot.

TDS contends that the public interest does not require preservation of the finding because no other CLECs intervened in its "well publicized" complaint or filed complaints of their own subsequent to the revision of SBC's termination policies. It argues that the likelihood of imposing a larger fine on SBC in the future as a result of the finding at issue is remote. Further, it argues that if it defends the Order on appeal it is in effect doing so for unknown CLECS who might file similar complaints in the future.

TDS argues that the criteria for Rule 200.900 have been met (i.e., reopening is justified by a change in fact and is required by the public interest). However, even if they have not been met, in the Order the Commission retained jurisdiction over the fee issue and directed the parties to bring disputes about the issue to the Commission for resolution. The Joint Motion is the product of those negotiations. The Commission's retention of jurisdiction on the fee issue provides an independent basis to grant the Joint Motion and issue the amended order.

Recommendation

I am inclined to agree with Staff that the Joint Motion does not meet the requirements of Rule 200.900, in that: there is no real change of fact; and, the public interest does not mandate an amended order in this case. However, the Commission's retention of jurisdiction over the fee issue provides a separate basis for granting the requested relief. The Commission ordered the parties to negotiate the fee issue and to come back to the Commission to resolve any disputes. The proposed amended order is the result of the negotiations the Commission directed the parties to undertake. The alternative, i.e., granting TDS an award of fees but requiring it to spend an equal or greater sum to defend the award, or alternatively, to choose not to defend the award on appeal because the cost exceeds the potential benefit, is a Pyrrhic victory. On balance,

I recommend granting the Motion on solely on the basis of the Commission's retained jurisdiction over the fee issue.

Accordingly, I recommend that the Commission grant the Joint Motion to Reopen this case and enter the proposed amendatory order.

TAH:fs